

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
KIM M. WEBSTER,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 80-223

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the examination results for class III wastewater treatment plant operator, came before the Pollution Control Hearings Board, Nat Washington, chairman, Gayle Rothrock, and David Akana (presiding), at a formal hearing in Yakima on March 17, 1981.

Appellant appeared pro se; respondent was represented by Charles K. Douthwaite, Assistant Attorney General. Tami Kern, Yakima court reporter, recorded the proceeding.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board makes these

1 FINDINGS OF FACT

2 I

3 Appellant Kim Webster is an applicant for wastewater treatment
4 plant operator, class III. He is currently a wastewater treatment
5 plant operator II employed by the City of Yakima.

6 II

7 Respondent is an agency which, together with the Board of
8 Examiners for Wastewater Operator Certification (Certification Board),
9 administers the provisions of ch. 70.95B RCW and its regulations,
10 ch. 173-230 WAC.

11 III

12 In November, 1979, the Certification Board reviewed and approved
13 examinations for the various classes of operators for use in 1980.
14 The February, June, and October, 1980 class III operator examinations,
15 consisting of the same 152 questions, are identical.

16 IV

17 Respondent's employee, Lloyd Taylor, is a member of the
18 Certificaton Board and is the secretary to the board. At the time he
19 assumed his duties there was established by that board a passing score
20 of at least 80 percent on the examination for class III operators.
21 Mr. Taylor was and is not aware of any written document establishing
22 the qualifying score before he took office. In June of 1980 he caused
23 to be published a certain pamphlet known as DOE Publication 80-3. In
24 that pamphlet he purported to establish examination qualification
25 scores for the various categories of operators, including 70 percent
26 for class III operators. His actions were done without the approval
27 of the Certification Board.

1 V

2 On June 2, 1980 appellant took an examination for class III
3 operator administered by respondent. He failed to achieve a minimum
4 passing score of 70 percent established for that examination. After
5 taking the examination, he discovered that he had not received all the
6 materials distributed; in particular, a sheet of formulas and
7 constants provided to other examinees. Rather than appealing from the
8 result, appellant elected to retake the test at the October 6, 1980
9 examination as suggested by Mr. Taylor.

10 VI

11 Upon considering the activities of its secretary evidenced in
12 Publication 80-3 at its July 1980 meeting, the Certification Board
13 retroactively adopted the qualification scores contained therein for
14 the February and June 1980 examinations.

15 At a special meeting in September, 1980, the Certification Board
16 approved certain revisions of Publication 80-3. The revisions removed
17 any mention of minimum qualification scores. The revision was
18 distributed after November 13, 1980, to all certified operators,
19 including appellant. No information was disseminated by the Board
20 which set forth the minimum qualifying score on examinations for any
21 class of operator.

22 VII

23 On October 6, 1980, appellant appeared for the examination. Among
24 the materials distributed was a letter informing the applicants that
25 the results of the test would not be disclosed until sometime after
26 the November 7, 1980 Certification Board meeting.

VIII

At its November 1980 meeting, the results of the February and June, 1980 examinations were discussed by the Certification Board. Several questions were suspected to be invalid based upon the large number (over seventy percent) of incorrect answers to them. The Board required that the examinations be reviewed for validity and clarity, and then for recommended passing scores for each examination. The recommended passing score for the class III examination was 80 percent, which was approved by the board members.

IX

On November 15, 1980 appellant received the results of the October examination. Of the 152 questions asked, appellant answered 48 incorrectly resulting in a 68.4 percent correct score. This 68.4 percent score is directly comparable to the June scoring standard. In the October test, respondent eliminated ten questions which it determined to be invalid. On an adjusted basis, appellant answered 38 of the 142 questions incorrectly, resulting in a 73.4 percent correct score. The qualifying score for the October class III examination was established at 80 percent.

X

Respondent did not eliminate questions from the June examination, nor did it adjust any June test scores as a result of its later adjustments to the October examination. Appellant took the same examination, consisting of 152 questions, in June and October. He failed to achieve a score of 70 percent on both examinations, based on 152 questions.

1 XI

2 Appellant did not meet or exceed the qualifying score for class
3 III operator and was notified that he failed the examination.
4 Respondent's action was appealed to this forum.

5 XII

6 Any Conclusion of Law which should be deemed a Finding of Fact is
7 hereby adopted as such.

8 From these findings, the Board comes to these

9 CONCLUSIONS OF LAW

10 I

11 The Certification Board was created by RCW 70.95B.070. Such Board
12 "shall assist in the development of rules and regulations, shall
13 prepare, administer and evaluate examinations of operator competency
14 as required in this chapter, and shall recommend the issuance or
15 revocation of certificates." RCW 70.95B.070. The purpose of
16 ch 70.95B. RCW is to protect the public health and to conserve and
17 protect the water resources of the state. RCW 70.95B.010.
18 Examination and certification of persons responsible for the
19 supervision and operation of wastewater systems plays an important
20 role in meeting the legislative declaration. RCW 70.95B.010; .030;
21 .090. In order to be certified, an applicant must file an
22 application, successfully complete an examination, and pay certain
23 fees. WAC 173-230-050.

24 The Certification Board has considerable discretion in carrying
25 out its duties and exercising its functions. However, in exercising

1 its discretion, it must not act in an arbitrary or capricious fashion,
2 or with improper motives. See Bock v. Pilotage Commissioners, 91
3 Wn.2d 94 (1978) and cases cited therein.

4 II

5 The circumstances of the June 1980 examination show that appellant
6 was not fairly tested as compared to others taking the same exam.
7 Although it may have been appropriate to allow appellant to retake the
8 examination immediately upon discovering the irregularity in his test
9 papers, appellant and respondent agreed to wait until the next
10 examination date.

11 III

12 The appellant labored under a misconception as to what minimum
13 qualifying score was required at the time he took the October 1980
14 examination. Communication from the respondent establishing the
15 correct informaton was, at best, ambiguous. Although the class III
16 qualifying score on page 9 of Publication 80-3 was deleted, a new
17 number does not appear to have been substituted and disseminated
18 before the examination. Appellant and other applicants were, or could
19 have been, misled as to what score to meet while selecting particular
20 questions to answer.

21 IV

22 The appellant did not achieve a score on the June 1980
23 examination, or an equivalent October 1980 examination, which met or
24 exceeded 70 percent. On the facts most favorable to appellant, and
25 applying the June 1980 qualifying score, appellant failed to meet the

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER

1 minimum score required to pass the class III operator examination.
2 Accordingly, respondent's decision that appellant did not qualify for
3 class III operator certification should be affirmed.

4 V

5 The appellant has not shown that he qualifies for certification as
6 a class III operator under any set of facts. Therefore, we cannot
7 grant the relief he requests. However, in view of the irregularities
8 on his June 1980 examination and the ambiguities regarding qualifying
9 scores on the October 1980 examination, appellant should be afforded
10 an opportunity to take, and to have graded at current standards, the
11 class III operator examination anew at the earliest practical date
12 without further cost or application to do so. Fairness would require
13 it.

14 VI

15 Any Finding of Fact which should be deemed a Conclusion of Law is
16 hereby adopted as such.

17 From these Conclusions, the Board enters this
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1 ORDER

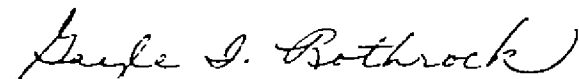
2 The decision of respondent is affirmed and remanded for further
3 action consistent with this decision.

4 DATED this 27th day of March, 1981.

5 POLLUTION CONTROL HEARINGS BOARD

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8 
9 NAT W. WASHINGTON, Chairman

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11 
12 DAVID AKANA, Member

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15 
16 GAYLE I. ROTHROCK, Member